APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Nos. 81-1441 and 81-1486

No. 81-1441

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellants.

Appeal From The United States District Court For The District of North Dakota

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No. 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellant,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellees.

Appeal From The United States District Court For The District of North Dakota

Submitted: December 14, 1981
Filed: February 12, 1982

Before:

GIBSON, Senior Circuit Judge, BRIGHT, Circuit Judge, and LARSON,* Senior District Judge.

LARSON, Senior District Judge.

The Secretary of the Interior, et al., appeal from the judgment of the district court, *State of North Dakota, ex rel. Board of University and School Lands* v. *Andrus*, 506 F. Supp. 619 (D.N.D. 1981),[1] holding that the Little Missouri River in North Dakota was navigable in fact on the date of North Dakota's statehood, and hence that title to the bed of the stream originally vested with the State of North Dakota under the equal footing doctrine and the Submerged Lands Act, § 3, 43 U.S.C. § 1311 (1976). We affirm.

The Little Missouri River has its source in the northeastern corner of Wyoming. It flows northward through the southeast corner of Montana, the northwest corner of South Dakota, and the badlands of western North Dakota. It joins the Missouri River in west central North Dakota. The Board of University and School Lands of the State of North Dakota commenced this suit on October 31, 1978, to prevent the federal government from issuing oil and gas leases on the bed of the Little Missouri River in North Dakota. The federal government has issued such leases since at least 1955.

The parties agree that the State of North Dakota was originally vested with title to land under waters that were

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*Earl R. Larson, Senior District Judge, District of Minnesota, sitting by designation.

[1]The Honorable Bruce M. Van Sickle, United States District Judge for the District of North Dakota.

navigable on October 1, 1889, the date of statehood. [2] At a one day trial the State presented documentary evidence on the historical and current status of the waterway. There was evidence of canoe travel prior to statehood, an effort to float logs down the river shortly after North Dakota became a state, present-day recreational canoe traffic, and other small craft usage over the years. The evidence suggested that the possibility of travel in both historical and contemporary times has depended on the water level and the season of the year, and that some sections have been extremely difficult to negotiate due to rapids and other obstructions. The federal government did not present any evidence on navigability; the Department of Justice only presented evidence on notice for statute of limitations purposes. The district court found that it was entitled to hear the matter as a quiet title action under 28 U.S.C. § 2409a (1976), that the twelve year statute of limitations in section 2409a(f) did not bar the suit even though the United States claimed that the State knew of the federal leases as early as 1955, and that there was sufficient evidence to find that the river was navigable as of statehood. [3]

The federal government appeals, arguing that the statute of limitations in section 2409a(f) applies in this action and that, at any rate, the State's evidence demonstrates that the Little Missouri was not navigable. The State cross appeals, maintaining that even if the appellate court finds that the statute of limitations precludes suit under section 2409a, the district court erred in ruling that there was no jurisdiction under the federal question provision, 28 U.S.C. § 1331 (1976), for the State's original complaint. Rather than requesting the court to

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[2] The federal government's assertion of title is based on its status as a riparian landowner.

[3] The Three Affiliated Tribes were not represented in the litigation. Recognizing the interest of the Tribes in the bed of the river within and bordering the Fort Berthold Reservation, the district court states that any orders shall have no effect on the bed of the Little Missouri River below the west line of Lot 10, Section 34, Township 148 North, Range 95 West.

quiet title, the State originally asked for a declaration that the river is navigable and an Order for the defendants to cease developing the bed of the river. The State of California, through its State Lands Commission, has submitted an amicus curiae brief in these appeals opposing the position of the federal government and supporting the State of North Dakota.

Statute of Limitations

Congress waived sovereign immunity for quiet title actions in section 2409a. This statute provides:

> The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights. 28 U.S.C. § 2409a(a). [4]

A statute of limitations for action under section 2409a is found in 28 U.S.C. § 2409a(f):

> Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States.

The federal government argues that this statute of limitations bars the instant action, while the district court found and the State argues that section 2409a(f) does not apply to a claim by a sovereign to public trust lands.

Under the rule *quod nullum tempus occurrit regi* the defenses of statute of limitations and laches cannot be asserted against a sovereign. *Guaranty Trust Co.* v. *United States*, 304 U.S. 126, 132 (1938). Although this rule developed in England as a royal prerogative, it is supported in modern law by the policy judgment that the public should not suffer because of the negligence of its officers and agents. *Id.* A statute of limita-

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[4] Under 28 U.S.C. § 1346(f) (1976), the district courts have original jurisdiction over actions brought pursuant to 28 U.S.C. § 2409a (1976).

tions will only apply to a sovereign when the statute expressly designates the sovereign or when the sovereign must necessarily be subject to the statute as determined by legislative intent. *See, e.g., id.* at 133; *Weber* v. *Board of Harbor Comm'rs*, 85 U.S. (18 Wall.) 57, 70 (1873).

In the present suit North Dakota is asserting title to lands which would be public trust lands if held by the State. [5] Public trust lands are held in trust for the citizens of a state and they are distinguished from lands which the State holds in a proprietary capacity. Title to public trust lands is a basic attribute of state sovereignty. *See, e.g., United States* v. *Mission Rock Co.*, 189 U.S. 391, 404 (1903); *Shively* v. *Bowlby*, 152 U.S. 1, 49 (1894). Rather than arising under congressional grant, title to public trust lands is vested in the states by the Constitution. *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. 363, 374 (1977).

The alleged public trust character of the lands that are the subject of this suit has special implications for the applicability of the section 2409a(f) statute of limitations. In *Weber* v. *Board of Harbor Comm'rs* the Supreme Court addressed the issue of title to submerged public trust lands. In the course of its discussion the Court noted: "[s]tatutes of limitation are not . . . held to embrace the State, unless she is expressly designated, or necessarily included by the nature of the mischiefs to be remedied." 85 U.S. at 70. Also of significance here is the more recent case of *United States* v. *California*, 332 U.S. 19 (1947), in which the Court held that laches, estoppel, and adverse possession did not preclude the United States from asserting title to submerged public trust lands. *Id.* at 39-40. The Court went on to hold that the federal government had title in certain submerged tidelands. *Id.* at 41. Although Congress effectively overruled the Court in its adoption of the Submerged Lands

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[5] The Supreme Court of North Dakota has held that State lands beneath navigable waters are held in trust for the public. *United Plainsmen Assoc.* v. *North Dakota State Water Conservation Comm'n*, 247 N.W.2d 457, 461 (N.D. 1976).

Act, 43 U.S.C. §§ 1301, *et seq.*, the principle that equitable defenses do not bar a sovereign from asserting its title to public trust lands applies just as strongly to the State of North Dakota in the present dispute as it did to the United States in *United States* v. *California*.

The statute of limitations in section 2409a(f) does not expressly mention actions by states, nor does the legislative history provide any support whatsoever for the proposition that Congress intended section 2409a(f) to apply to actions such as the case at bar. The House Report for section 2409a(f) refers to "persons," "citizens," and "individual citizens," [6] but nowhere does it mention "states." [7] H.R. Rep. No. 92-1559, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4547-52. In addressing the liability of states for civil rights violations under 42 U.S.C. § 1983 (1976) to states, the Supreme Court noted the absence of reference to states in the legislative history and said: "[w]e can only conclude that this silence on the matter is itself a significant indication of the legislative intent." *Quern* v. *Jordan*, 440 U.S. 332, 343 (1979).

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[6] In a different although still relevant situation the Supreme Court stated:

> "[I]n common usage, the term 'person' does not include the sovereign [and] statutes employing the phrase are ordinarily construed to exclude it. ". . . Particularly is this true where the statute imposes a burden or limitation, as distinguished from conferring a benefit or advantage. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 667 (1979).

[7] At one point the House Report says of the statute of limitations that "the period is fixed in this manner so that the Government will not have to defend against *state* claims." H.R. Rep. No. 92-1559, *reprinted in* [1972] U.S. Code Cong. & Ad. News 4547, 4550 (emphasis added). It is apparent from the context, however, that this was a typographical error and that the word "*state*" should have appeared rather than "*stat.*." The court in *Hatter* v. *United States*, 402 F. Supp. 1192 (E.D. Cal. 1975) has also recognized that this was a typographical error and that the proper word was "stale." *See id.* at 1194.

It might be argued in response that even if the legislative history does not explicitly mention states, the general purpose of the statute of limitations in barring stale claims would not be served if states are exempted. In light of the relatively recent adoption of the Submerged Lands Act in 1953, however, it is difficult to argue that Congress would consider a claim by a state to public trust lands stale. The effect of the Submerged Lands Act was to reaffirm the title of the states to lands beneath navigable waters at statehood. *State of California ex rel. State Lands Comm'n* v. *United States*, 512 F. Supp. 36, 39-40 (N.D. Cal. 1981). Insofar as the impetus of the enactment of the quiet title statute in section 2409a was a dispute between private landowners, *California* v. *Arizona*, 440 U.S. 59, 67 n.7 (1979), it is further apparent that the concern of Congress in enacting the section 2409a(f) statute of limitations was with the stale claims of private landowners, not states.

The federal government's primary argument for the application of section 2409a(f) to states is that the statute refers to "[a]*ny* civil action" (emphasis added), and that this language must necessarily include actions by states. The federal government also notes that the United States has *consented* to be sued under section 2409a, and cites the principle that any restrictions which a sovereign places on its consent to be sued, such as a statute of limitations, must be strictly construed. *See, e.g.*, *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980); *Soriano* v. *United States*, 352 U.S. 270, 276 (1957).

As the court in *State of California ex rel. State Lands Comm'n* v. *United States*, 512 F. Supp. at 36, aptly noted, the issue here is "a conflict between sovereign immunity doctrines." On the one hand there is the principle that a sovereign (North Dakota) should not be subject to equitable defenses such as a statute of limitations unless expressly included. On the other hand there is the principle that the consent of a sovereign (the United States) to waive sovereign immunity should be strictly construed. The court in *State of California ex rel. State Lands Comm'n* v. *United States* resolved this conflict for the state. *Id.* We believe that this is appropriate in the

present case as well because the interest of the people of the State of North Dakota in quieting title to public trust lands is great and because the United States Congress has the option of adding an express reference to states in section 2409a(f) if it wishes the statute of limitations to apply to actions such as the present one. [8]

The federal government has cited a number of decisions in the present case which it claims provide support for applying the statute of limitations. *See Nevada* v. *United States*, No. 78-1185 (9th Cir. Sept. 18, 1980), *cert. denied*, 101 S. Ct. 1695 (1981); *Park County, Montana* v. *United States*, 626 F.2d 718 (9th Cir. 1980), *cert. denied*, 449 U.S. 1112 (1981); *Hart* v. *United States*, 585 F.2d 1280 (5th Cir. 1978), *cert. denied*, 442 U.S. 941 (1979). In our view these three cases are all dis-

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[8] The court in *State of California ex rel. State Lands Commission* v. *United States*, 512 F. Supp. 36, 45 (N.D. Cal. 1981), suggested that there would be a problem under the Tenth Amendment to the United States Constitution if the statute of limitations were applied to the states "because the federal government would be infringing upon an important sovereign characteristic of the state, that characteristic being that as part of its sovereignty the state holds certain lands in trust for the use and benefit of its citizens. A statute of limitations enacted by Congress should not be applied where it would deprive a state of public trust land." In the present case the State of North Dakota offered a similar argument, but the district court ruled that "since the matter is resolvable without reaching the constitutional issue, that claim is not here discussed." 506 F. Supp. at 626. We are also of the opinion that it is not necessary to reach the Tenth Amendment claim and that this matter would be better taken up at a later time when it has been more thoroughly briefed. We note in dictum, however, that the argument for a constitutional prohibition on the application of a statute of limitations to actions by states under 28 U.S.C. § 2409a (1976) seems problematic to us. As we have said above, by enacting section 2409a the United States voluntarily waived its sovereign immunity from suit. We are not convinced that there can be a constitutional objection to the federal government's placement of a limit on the extent to which it will give up its immunity.

tinguishable or otherwise defective as authority. Briefly, *State of Nevada* has the status of a "Memorandum" and it has not been published. Under Rule 21(c) of the United States Court of Appeals for the Ninth Circuit "[a] disposition which is not for publication shall not be regarded as precedent and shall not be cited to or by this Court or any district court of the Ninth Circuit either in briefs, oral argument, opinions, memoranda, or orders, except when relevant under the doctrines of law of the case, res judicata, or collateral estoppel." Moreover, Rule 8(i) of this Court provides:

> No party may cite an opinion that was not intended for publication by this or any federal or state court, except when the cases are related by virtue of an identity between the parties or the causes of action.

Thus, *State of Nevada* is without precedential value in this Court. Even if the decision could be cited as authority, it is apparent that the applicability of section 2409a(f) to an action by a state was not really litigated because the court said that the state did not contest this point. *See* slip op. at 2. *Park County, Montana* is distinguished in that it was brought by a county, not a state. A county is the mere creature of a state and does not have the same status as a sovereign. Further, the court did not consider the public trust lands concept. The public plaintiff in *Hart* was a city, and thus this case is distinguished on similar grounds.

In sum, we find that there is a basis both in policy and precedent for affirming the district court in its finding that the statute of limitations in section 2409a(f) does not apply to an action by a state to quiet title to public trust lands. Because we find that the statute of limitations is inapplicable in the present case, we need not address the federal government's argument that the State received notice within the limitation period, nor need we consider the State's cross appeal arguing that an alternative basis for jurisdiction can be premised upon 28 U.S.C. § 1331.

Navigability

If the Little Missouri was navigable upon the date of North Dakota's admission to the union, then title to the bed of the waterway vested in the State at that time. In *Martin* v. *Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842), the Supreme Court held that after the American Revolution title beneath navigable waters passed to the original 13 states. In *Pollard* v. *Hagan*, 44 U.S. (3 How.) 212, 228-29 (1845), the Court held that under the equal footing doctrine subsequently admitted states have the same rights to lands beneath navigable waters. *Accord*, *Shively* v. *Bowlby*, 152 U.S. at 26. the equal footing doctrine provides that states admitted after the first 13 have the same rights of sovereignty, jurisdiction, and absolute title over sovereign lands as their predecessors. As noted above, Congress reaffirmed original title of the states to lands beneath navigable waters in the Submerged Lands Act, 42 U.S.C. § 1311. The Supreme Court has recently applied this principle in *Montana* v. *United States*, 450 U.S. 544, 551 (1981), and *Oregon ex rel. State Land Board* v. *Corvallis Sand & Gravel Co.*, 429 U.S. at 374.

The legal standards on navigability have developed over a long line of cases. In *The Daniel Hall*, 77 U.S. (10 Wall.) 557, 563 (1870), the Supreme Court set forth what has become the basic standard:

> Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water.

In *The Montello*, 87 U.S. (20 Wall.) 430, 441 (1874), the Court elaborated, stating that "the true test of the navigability of a stream does not depend on the mode by which commerce is, or may be, conducted, nor on the difficulties attending navigation." The Court also stated that "[i]t would be a narrow rule to hold that in this country, unless a river was capable of being

navigated by steam or sail vessels, it could not be treated as a public highway." *Id.* The Court cautioned, however, that:

> It is not . . . "every small creek in which a fishing skiff or gunning canoe can be made to float at high water which is deemed navigable, but, in order to give it the character of a navigable stream, it must be generally and commonly useful to some purpose of trade or agriculture." *Id.* at 442.

The focus on commerce does not require that the waterway be clear of obstructions or easily traveled thoughout the entire year. As the Court said in *Economy Light & Power Co.* v. *United States*, 256 U.S. 113, 122 (1921), "[n]avigability, in the sense of the law, is not destroyed because the watercourse is interrupted by occasionaly natural obstructions or portages; nor need the navigation be open at all seasons of the year, or at all stages of the water." In *Utah* v. *United States*, 403 U.S. 9, 10, 12 (1971), a case concerned with the claim of the State of Utah to the bed of the Great Salt Lake under the equal footing doctrine, the Supreme Court cited the above quoted passage from *The Daniel Ball* and upon review of the facts concluded that the lake was navigable. As the Court said, "[t]he lake was used as a highway and that is the gist of the federal test." 403 U.S. at 11.

The district court in the present case drew upon *Utah* v. *United States* for its definition of navigability. 506 F. Supp. at 622. In support of its conclusion that the Little Missouri was navigable as of statehood, the district court recounted a number of facts from the documentary evidence introduced by the State at trial. The district court noted that in 1804 one Baptiste Le Page made a canoe journey from the Black Hills down the Little Missouri to join the Corps of Discovery. Meriweather Lewis discussed the journey with Le Page and wrote of the river after viewing its mouth:

> The Little Missouri disembogues on the S. side of the Missouri 1693 miles from the confluence of the latter with the Mississippi, it is 134 yards wide at it's mouth, and sets in with a bould current but it's greatest debth is not more than 2 1/2 feet. It's navigation is extremely difficult, owing

> to its rapidity, shoals and sand bars *it may however be navigated with small canoes a considerable distance.* This river passes through the Northern extremity of the black hills where it is very narrow and rapid and it's banks high an[d] perpendicular. it takes it's rise in a broken country West of the Black hills with the waters of the yellow stone river, and a considerable distance S.W. of the point at which it passes the black hills. 1 *Lewis and Clark Journals* 298 (Thwaites ed.). (emphasis added). [9]

The district court next noted that there was an effort to float logs down the stream just after statehood in 1881 and 1882 by one Eber H. Bly, and that the river currently carries about 200 recreational canoes per year. In a footnote, 506 F. Supp. at 623 n.6, the court also quoted a 1975 United States Corps of Engineers report which states: "[d]ue to historical and potential use, it is recommended that the Little Missouri River be classified as a navigable waterway of the United States." United States Corps of Engineers, *Little Missouri River Navigability Study* 18 (1975).

In addition to the evidence cited by the trial court, there was other documentary evidence in the record bearing on navigability. There were reports of a number of other instances of small boat usage as well as general information on water level and obstructions in the stream. Most importantly, the evidence suggested that the water level and hence the passability of the river depends on the season of the year. The water tends to be high during spring flood periods, at times quite low in the summer, and, of course, frozen during the winter.

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[9] Clark wrote on the same day: "[o]ne of our men, Baptiste, who came down the river in a canoe, informs me that it is not navigable. He was 45 days descending." 1 *Lewis and Clark Journals* 300 (Thwaites ed.). The district court reproduced this quotation and commented: "[b]ut of course he did navigate it, and late in the fall when the river is at its very lowest." 506 F. Supp. at 619 n.23. At oral argument counsel for the State of North Dakota maintained that this quotation from Clark might best be understood in light of the fact that Lewis and Clark were traveling by keelboat. Although the stream was passable by Le Page in his canoe, counsel suggested it could not have been negotiated in a keelboat.

Although we feel that the evidence in the record concerning navigability is rather thin, we will still affirm the district court. The legal standards on navigability are liberal, and we must bear in mind that the issue is one of potential commercial use and hence navigability at the time of statehood, not in the present day. In this sense, our decision in *George* v. *Beavark, Inc.*, 402 F.2d 977 (8th Cir. 1968), is clearly distinguished. In *George*, the only use of the stream that this Court found significant was float fishing in hand propelled boats that drew from two to six inches of water. This Court ruled the stream non-navigable and hence not within admiralty jurisdiction. In *Livingston* v. *United States*, 627 F.2d 165, 169-70 (8th Cir. 1980), *cert. denied*, 450 U.S. 914 (1981), this Court assessed *George* and noted that the test of navigability that is employed must be determined by the purpose for which navigability is being assessed, whether for admiralty jurisdiction, land claims, or for some other reason. Turning to the question of what constitutes navigability for admiralty jurisdiction, this Court said that "the concept of 'navigability' in admiralty is properly limited to describing a *present* capability of waters to sustain commercial shipping." *Id.* (emphasis added). *George* is thus distinguished from the instant case in that the standard of present-day commercial use was employed rather than the potential for commerce at a date in the distant past. Although recreational float fishing of the sort involved in *George* is certainly not commercial shipping in modern terms, canoe travel at the time of North Dakota's statehood represented a viable means of transporting persons and goods.

The district court is affirmed on the appeal by Cecil Andrus and other officials of the United States as appellants (No. 81-1441), and the district court is affirmed on the appeal by the State of North Dakota (No. 81-1486).

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTH DAKOTA
SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Defendants.

MEMORANDUM AND ORDER

This action is an attempt by the State of North Dakota to oust the United States of America from its proprietary claim of entitlement to control the development of oil and gas interests which lie under the bed of the Little Missouri River.

Plaintiff bases its jurisdictional claim on the Federal question statute, 28 U.S.C. § 1331. The jurisdictional issue is contested by a defense motion for summary judgment which asserts that the correct jurisdictional statute is 28 U.S.C. § 2409a. It is well established that the Federal question test must be met by the complaint, and the complaint alone. Wright, Law of Federal Courts, 3rd Ed., § 18 at p. 69.

The language of the Federal question statute is taken from Article III, Sec. 2. [1] But Federal question jurisdiction is denied

[1] In fact this type of case (i.e., state versus United States) is one wherein the Supreme Court has concurrent original jurisdiction. U.S. Const. Art. III, Sec. 2, *See also, U.S.* v. *West Virginia*, 295

where there is no showing in the complaint of a genuine federal question.

As pointed out in Wright, Law of Federal Courts, 3rd Ed. § 17, there are as many tests as there are situations. But even under the test articulated in Mishkin, The Federal Question in the District Courts, 53 *Colum. L.Rev.* 157, 165, 168 (1953) that—"there must be a substantial claim founded directly upon Federal law"—the complaint does not support the claim of a Federal question.

The gravamen of the complaint is that the U.S. is wrongfully leasing state lands. This is either an adverse claim or a trespass to be measured by state law. In Restatement (Second), Conflict of Laws, § 227 the rule is stated

> "Whether there has been a transfer of an interest in land by adverse possession or by prescription and the nature of the interest transferred are determined by the local law of the situs."

The U.S. goes on to assert that even had this action been brought under 28 U.S.C. § 2409a, it is foreclosed jurisdictionally because it falls within one of the exceptions recited in the statute. Without laboring the matter, I cannot agree with that argument. The action lies squarely under 28 U.S.C. § 2409a.

Finally, the U.S. claims that 28 U.S.C. § 2409a(f), being a statute of limitations, defeats this action. Even assuming for the moment that the limitation can override the state law as to claims of adverse possession against a state, *See, Park County Montana* v. *U.S.*, 454 F. Supp. 1 (D.C.Mont. 1978), an examination of the defense exhibits shows that specific leases and specific lands must be evaluated before any such broad application of 28 U.S.C. § 2409a(f) is permissible.

The motion for summary judgment for the plaintiff is *denied*.

The motion for summary judgment by the defendant is *denied*.

Plaintiff's complaint shall be dismissed within 20 days of the date of this order pursuant to F.R.Civ.P. 12(h)(3), unless prior

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U.S. 463, 465 (1935); *U.S.* v. *Texas*, 339 U.S. 707 (1950); and *Utah* v. *U.S.*, 403 U.S. 9 (1971).

thereto, plaintiff shall amend its complaint to recite an adequate jurisdictional basis.

IT IS SO ORDERED.

Bismark, North Dakota, this 21 day of February, 1980.

/s/BRUCE M. VAN SICKLE, JUDGE

Bruce M. Van Sickle, Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Defendants.

MEMORANDUM AND ORDER

This is a civil action by the State of North Dakota which seeks relief from the actions of the Secretary of the Interior, the Secretary of Agriculture, the Director of the United States Bureau of Land Management, and the Chief of the United States Forest Service, who are engaged in leasing portions of the bed of the Little Missouri River for oil and gas development, and in other proprietary activities incompatible with the State's claimed ownership of the Little Missouri River Bed.

This Court has jurisdiction by virtue of 28 U.S.C. § 2409a (quiet title), and 28 U.S.C. § 1331 (federal question). The relief sought is available under 28 U.S.C. § 1361 (mandamus), and 28 U.S.C. §§ 2201 and 2202 (declaratory judgment and further relief).

The Constitutional reference to actions between a state and the United States is:

> "In all cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be a Party, the Supreme Court shall have Jurisdiction." United States Constitution, Article III, Section 2.

Chief Justice Marshall assumed that the Supreme Court's original jurisdiction was also exclusive. The statutes from 1789 to the present have proceeded on a different theory and have distinguished between situations in which the Supreme Court is given exclusive jurisdiction and those in which its jurisdiction is concurrent with that of the lower federal courts. The validity of such a division is now settled. *Charles Alan Wright*, Law of the Federal Courts, 3d Ed., p.556. Suit by a state against the United States is not permitted except in those instances where the United States has consented to be sued. *Wright*, supra, p. 558 and *Utah* v. *U.S.* (1969), 394 U.S. 89.

So in order to proceed further with this action, this Court must determine that:

a. The Supreme Court's jurisdiction in this action by a state against the United States, and testing a sovereign's entitlement to land, is not exclusive; and

b. That this is an area where the United States has consented to be sued.

The problem of exclusive jurisdiction: 28 U.S.C. § 2409a provides in part that" [sic]

> "The United States may be named as a party defendant in a civil action under this section to adjudicate a disputed title to real property in which the United States claims an interest, other than a security interest or water rights."

Thus is seems clear that in actions to quiet title wherein the United States claims an interest, the Congress has empowered a district court to hear the matter. The State of North Dakota has selected this forum so there is no problem of its consent that the action be tried at this level. The Supreme Court may, of course, exercise its discretion to invoke its original

jurisdiction, [1] but until is does so there is no problem of its consent that the matter remain at the district court level.

The problem of consent to be sued: This is an instance where the United States has consented to be sued. See *Utah*, supra.

The first issue which must be resolved is the question of navigability of the Little Missouri River. As pointed out in *Livingston* v. *United States*, 627 F.2d 165 (8th Cir. 1980), "navigability" means different things under different circumstances.

But for our purposes "navigability" means navigability at the date of statehood, *Utah* v. *United States*, 403 U.S. 9 (1971). A river is a navigable river when it is used or susceptible of being used in its ordinary condition as a highway for commerce over which trade and travel may be conducted in the customary modes of trade and travel on water, *Utah*, supra, p. 9.

> "The lake was used as a highway and that is the gist of the federal test." *Utah*, supra, p. 11.

The entire valley of the Little Missouri River lies within the Louisiana Purchase of 1803. The Fort Berthold Indian Reservation was carved out of the federal public domain by the Act of March 3, 1891, 26 Statutes 1032, two years after the admission of North Dakota as a state, October 1, 1889.

The Three Affiliated Tribes have such an interest in this litigation that resolution of the claims to any portion of the bed of the Little Missouri River which lies wholly within the Fort Berthold Reservation can only be effective if the Three Affiliated Tribes are before the Court. The area of interest to the Three Affiliated Tribes is that portion of the river bed downstream from the west line of Section 31, Township 147 North, Range 92 West of the 5th Principal Meridian, Dunn County, North Dakota, to the mouth of the Little Missouri River. The

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[1] The Supreme Court's usual exercise of jurisdiction is through certiorari. Rule 19 of the Supreme Court Rules includes, among other grounds for certiorari, that it may be granted when the Court of Appeals has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings.

Three Affiliated Tribes also have an interest in this litigation insofar as it may involve the bed of the stream along the southerly border of the Fort Berthold Reservation from a point on the west line of Lot 10 of Section 34, Township 148 North, Range 95 West of the Principal Meridian, to the aforementioned point on the west line of Section 31.

Therefore, any orders in this matter shall not be concerned with the bed of the Little Missouri River below the west line of Lot 10, Section 34, Township 148 North, Range 95 West.

The River's history of navigability and use for trade and travel predates the identification of the river by the Corps of Discovery.

Baptiste Le Page, a French Canadian, who had been in the Cote Noir (Black Hills) with the Cheyennes, came downstream on the Little Missouri to the Mandan Village on the Big Missouri at the mouth of the Knife River, near where the Corps of Discovery had built its winter quarters (Fort Mandan). On November 3, 1804 he was "signed on" with the Corps of Discovery. [2] And it is important to note that the Little Missouri River was the most convenient downstream route from the area of Devils Tower, northwest of the Black Hills to the Knife River settlement of Mandans, and as such was clearly an established channel of commerce between those two centers. Meriweather Lewis viewed the mouth of the river after discussing it with Le Page, and commented:

> "The Little Missouri disembogues on the S. side of the Missouri 1693 miles from the confluence of the latter with the Misssissippi, it is 134 yeards wide at it's mouth, and sets in with a bould current but it's greatest debth is not more than 2½ feet. it's navigation is extremely difficult, owing to its rapidity, shoals and sand bars it may however be navigated with small canoes a considerable distance. this river passes through the Northern extremity of the black hills where it is very narrow and rapid and it's banks high an(d) perpendicular. it takes it's rise in a broken country West of the Black hills with the waters of the

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[2] Lewis and Clark Journals, Thwaites, Vol. 1, p. 216.

> yellow stone river, and a considerable distance S.W. of the point at which it passes the black hills." [3]

The river continued navigable into the turn of the century, witness the logging operation of Eber H. Bly, 1881 and 1882. [4] Finally, the river presently carries approximately 200 canoes each year. The trip usually runs from Medora to the Lost Bridge, where it terminates in the waters of Lake Sakakawea. However the trips can easily originate as far upstream as the Devils Tower. [5]

Thus I conclude that the Little Missouri River was navigable in fact on October 1, 1889, and continues to be navigable to this date. [6]

Since the Little Missouri River is a navigable stream, title to the bed of that stream is originally vested in the State of North Dakota.

The "Shively Doctrine" as articulated in *Shively* v. *Bowlby*, 152 U.S. 1, at 26-31 (1894) is that: There is a presumption that

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[3] Journals, supra, Vol. 1, p. 298. Clark in his journal entry for the same day says:

> "One of our men, Baptiest, who came down this river in a canoe, informs me that it is not navigable. He was 45 days descending." Journals, supra, Vol. 1, p. 300.

But of course he did navigate it, and late in the fall when the river is at its very lowest.

[4] Bismarck Tribune, June 14, 1882. Bly contracted to cut rail ties near Marmarth, North Dakota, south and upstream from the Northern Pacific crossing at the town of Little Missouri (near Medora). He went bankrupt but he floated down the logs.

[5] See letter of Chief Ranger, September 17, 1980.

[6] In the evidence is a report entitled "Little Missouri River Navigability Study," prepared for the United States Corps of Engineers and dated June 20, 1975, wherein the researchers conclude at page 18 that:

> "Due to historical and potential use, it is recommended that the Little Missouri River be classified as a navigable waterway of the United States." (Exhibit 1)

lands underlying navigable waters pass to the state upon its admission into the Union because of the Constitutional doctrine of equal footing. This doctrine rises not from an express Constitutional provision, but from the interpretation of the Constitution by the Supreme Court, that this country is a union of political equals. *Case* v. *Toftus*, 39 F. 730, p. 732 (CCD Oregon 1889). The Shively Doctrine is also explained as consistent with enabling legislation which provides for admission of the state "on an equal footing with the original states." See *United States* v. *Texas*, 339 U.S. (1950), where the equal footing principle worked to the disadvantage of Texas. In the Enabling Act which provided for the statehood of North Dakota, the "equal footing" language reads:

> "(North Dakota) . . . shall be deemed admitted by congress into the union on an equal footing with the original states." The Enabling Act, Chapter 180, 25 U.S. Statutes at Large, 676 Sec. 7.

The original states of the Union, by virtue of the revolution and their sovereignty, succeeded to the English Crown's title and dominion to the land underlying navigable waters. Thus it was held that:

> ". . . to deny to the states admitted subsequent to the formation of the Union, ownership of this property would deny them admission on an equal footing with the original States, since the original States did not grant these properties to the United States, but reserved them to themselves." *United States* v. *Texas*, supra, p. 716.

In fact, once the factual issue of navigability is determined, North Dakota's entitlement to the riverbed is confirmed by the clear mandate of Congress found in 43 U.S.C. §§ 1301, 1303, 1311-1315 (Submerged Lands Act). Section 1311(a) reads:

> "It is determined and declared to be in the public interest that (1) title to and ownership of the lands beneath navigable waters within the boundaries of the respective States, and the natural resources within such lands and waters, and (2) the right and power to manage, administer, lease, develop, and use the said lands and natural resources all in accordance with applicable State law be,

> and they are, subject to the provisions hereof, recognized, confirmed, established, and vested in and assigned to the respective States or the persons who were on June 5, 1950, entitled thereto under the law of the respective States in which the land is located, and the respective grantees, lessees, or successors, in interest thereof; . . ." 43 U.S.C. § 1311a. [7]

While the United States refuses to concede that the Little Missouri River is navigable, despite the recommendation of its researchers that it be recognized to be navigable, it also claims that North Dakota cannot prevail in this case:

1. Because the United States has acquired title to the bed of the stream by adverse possession; [8] and
2. In any event, under 28 U.S.C. § 2409a(f), a statute of limitations has run against North Dakota.

The United States bases it claim of adverse possession on a history of oil and gas leasing, an apparent outgrowth of the leasing of national park lands, hay lands, and forest lands along the Little Missouri River.

But Section 164 of the Constitution of North Dakota provides that:

> "No claim for the occupation, cultivation, or improvement of any public lands shall ever be recognized."

The public lands here involved are more than privately held by the state as proprietor; they are in fact held in trust for the people of North Dakota.

North Dakota has recognized that it holds these lands under the Public Trust Doctrine. *United Plainsman* v. *North Dakota State Water Commission*, 247 NW2d 457. And the lands so

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[7] The "sovereignty analysis" relies heavily on an outstanding note by Rebecca S. Thiem in Vol 55, No. 3, NDLR, p. 455, et seq.

[8] The law of proof of open notorious and adverse possession through use of recorded instruments requires careful consideration of the scope, extent, continuity, and terms of the adverse possession evidenced by those instruments. This type of information was not furnished.

acquired, and so held, are held by the state in its sovereign capacity. The United States Supreme Court said in *Pollard's Lessee* v. *Hagen, et al.*, 44 U.S. 212 (1845):

> "This right of eminent domain over the shores and the soils under the navigable waters, for all municipal purposes, belongs exclusively to the states within their respective territorial jurisdictions, and they, and they only, have the constitutional power to exercise it. To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the states of the power to exercise a numerous and important class of police powers.
>
> * * *
>
> By the preceding course of reasoning we have arrived at these general conclusions: First, The shores of navigable waters and the shores under them, were not granted by the Constitution of the United States, but were reserved to the states respectively. Secondly, The new states have the same rights, sovereignty, and jurisdiction over the subject as the original states."

Pollard's Lessee, supra, p. 230.

The doctrine of *Pollard's Lessee* was reaffirmed as late as 1977 in *Oregon Ex Rel. State Land Board* v. *Corvallis Sand and Gravel Co.*, 429 U.S. 363 (1977), where the Supreme Court said:

> "(U)nder *Pollard's Lessee*, the State's title to lands underlying navigable waters within its boundaries is conferred *not by Congress but by the Constitution itself*. The rule laid down in *Pollard's Lessee* has been followed in an unbroken line of cases which make it clear that the *title thus acquired by the State is absolute so far as any federal principle of land titles is concerned*. For example, in *Weber* v. *Harbor Comm'rs*, 18 Wall., at 65-66, 21 L.Ed. 798, the Court reaffirmed the doctrine of *Pollard's Lessee:*
>
> Upon the admission of California into the Union upon equal footing with the original States, *absolute property in*, and *dominion over*, all soils under the *tidewaters* within her limits passed to the State, with the con-

> sequent right to dispose of the title to any part of said soils in such manner as she might deem proper, subject only to the paramount right of navigation over the waters. . . ."

(Emphasis supplied.)

These lands being held by the State of North Dakota in its sovereign capacity, and as trustee for the people of North Dakota, the provisions of Section 164, Constitution of North Dakota, simply confirm the rule that North Dakota can never abdicate its trust obligation. *Illinois Central Railroad* v. *Illinois*, 146 U.S. 387 (1892).

Neither doctrines of laches, nor statutes of limitation of actions can be allowed to defeat the state's sovereign title to trust lands.

In *Carr* v. *Moore*, 93 NW2d 52 (54-55), the rule was succinctly stated:

> "Whether the title to the bed remained in the United States or passed to the State, no adverse possession thereof would be effectual, for the statute of limitations does not run as against the sovereign."

28 U.S.C. § 2409a(f) provides:

> "Any civil action under this section shall be barred unless it is commenced within twelve years of the date upon which it is accrued. Such action shall be deemed to have accrued on the date the plaintiff or his predecessor in interest knew or should have known of the claim of the United States."

The legislative history of the statute shows that Congress intended it to apply exclusively to persons, be they private citizens or private or public corporations. See 1972 U.S. Code Cong. & Admin. News 4547-4557. In all of the cases cited by defendant not one concerned, as in this case, an effort to defeat

a claim by a sovereign to trust lands held in its sovereign capacity. [9]

Justice Story said, in an action in debt against sureties of one, Reed, tax collector, who claimed laches as a defense:

> "The general principle is, that *laches* is not imputable to the government; . . . not in the notion of extraordinary preogatives, but upon a great public policy." *U.S.* v. *Kirkpatrick, and others*, 22 U.S. (Wheaton 9) 720, 735 (1824).

In Guaranty Trust Co. v. United States, 204 [sic] U.S. 126, Justice Stone said:

> "The rule *quod nullum tempus occurrit regi*—that the sovereign is exempt from the consequences of laches, and from the operation of statutes of limitations—appears to be a vestigial survival of the prerogative of the Crown. (cases cited)
>
> But whether or not that alone counts for its origin, the source of its continuing vitality where the royal privilege no longer exists is to be found in the public policy now underlying the rule even though it may in the beginning have had a different policy basis. Compare Maine, Ancient Law (10th Ed., 1930) 32 et seq. "The true reason is to be found in the great public policy of preserving the public rights, revenues and property from injury and loss, by the negligence of public officers. And though this is sometimes called a prerogative right, it is in fact nothing more than a reservation, or exception, and equally applicable to all governments." (cases cited)."

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[9] This Court has just had the privilege of reviewing *State of California ex rel. State Lands Commission* v. *United States of America*, United States District Court, Northern District of California, No. C 79-1865 RPA, filed January 6, 1981. It is the only case which this Court has found that has met the issue of the sovereign's capacity to protect its trust lands.

But see *Park County, Montana* v. *United States*, 626 F.2d 718 (9th Cir. 1980), (contra).

This rule the United States has applied to its benefit in resolving claims of title to submerged lands. In *United States* v. *California*, 332 U.S. 19, 40 (1947), the Supreme Court held:

> "The Government (the United States) which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act."

Finally, to allow the administrative officers of the United States to prevail in their effort to claim these lands is directly contrary to and in defiance of the expressed will of the Congress, as found in 43 U.S.C. § 1311(a), quoted earlier in this memorandum.

And as shown by the legislative history of the Submerged Lands Act, as found in 1953 U.S. Code Cong. and Adm. News, [C]ommencing at page 1385, a purpose of the Act was to turn the matter of issuing oil and gas leases to the beds of navigable waters over to the state once and for all.

And 28 U.S.C. § 2409a(d) mandates that if the United States disclaims an interest in real property (for example, the [dis]-claimer contained in 43 U.S.C. § 1311(b)(1), no decision in the district court can find against that disclaimer.

Plaintiffs have raised a Tenth Amendment claim. But since the matter is resolvable without reaching the constitutional issue, that claim is not here discussed.

For the reasons stated and to the extent therein indicated, I conclude that the plaintiff is entitled to the relief sought. Counsel for the State of North Dakota will forthwith prepare and

submit an appropriate form of judgment in conformity herewith.

IT IS SO ORDERED.

Fargo, North Dakota, this 3 day of February, 1981.

BY THE COURT:

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NORTH DAKOTA SOUTHWESTERN DIVISION

Civil No. A78-1092

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Plaintiff,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. McGUIRE, Chief of the
United States Forest Service,
Defendants.

FILED
FEB 24 1981
Cletus J. Schmidt, Clerk
U.S. District Court-North Dakota

JUDGMENT

In accordance with the Memorandum and Order of the Court entered February 4, 1981, IT IS HEREBY ADJUDGED AND DECREED:

(1) The Little Missouri River is declared to be a navigable river for the purpose of determining ownership of the bed thereof.

(2) Title to the bed of the Little Missouri River within the State of North Dakota, excluding that portion lying

below the west line of Lot 10 of Section 34, Township 148 North, Range 95 West of the Fifth Principal Meridian, Dunn County, is hereby quieted in the State of North Dakota.

(3) The United States is directed to cease and desist from further developing or otherwise exercising privileges of ownership upon the bed of the Little Missouri River lying within the State of North Dakota.

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle, Judge
United States District Court

APPENDIX E

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

Nos. 81-1441 and 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee/Cross-Appellant,

v.

CECIL ANDRUS, Secretary of the Interior;
BOB BERGLAND, Secretary of Agriculture;
FRANK GREGG, Director of the United States
Bureau of Land Management;
and JOHN R. MCGUIRE, Chief of the
United States Forest Service,
Appellants/Cross-Appellees.

This appeal from the United States District Court for the ____ District of North Dakota was considered on a designated record from the United States District Court and on briefs of the respective parties and was argued by counsel.

After consideration, it is ordered and adjudged that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 12, 1982

Let the within Mandate be filed and entered on the Clerk's records.

Dated April 24, 1982

/s/ BRUCE M. VAN SICKLE, JUDGE
Bruce M. Van Sickle,
Judge, U. S. District Court

A true Copy:

ATTEST:

Clerk, U.S. Court of Appeals, Eighth Circuit
4/21/82

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SEPTEMBER TERM, 1981

Nos. 81-1441 and 81-1486

THE STATE OF NORTH DAKOTA, *ex rel.*,
Board of University and School Lands,
Appellee/Cross-Appellant,

v.

CECIL ANDRUS, etc., *et al.*,
Appellants/Cross-Appellees.

Appeals From The United States District Court For The District Of Minnesota.

The Court, having considered appellants-cross/appellees' petition for rehearing and suggestions for rehearing en banc and being now fully advised in the premises, hereby orders the petition for rehearing and suggestions for rehearing en banc denied.

March 15, 1982

☆ U. S. GOVERNMENT PRINTING OFFICE: 1982 379827 1002